

**FIRST AMENDMENT
TO THE
MEMORANDUM OF AGREEMENT REGARDING COLLABORATION ON THE
PLANNING, PRELIMINARY DESIGN AND ENVIRONMENTAL COMPLIANCE FOR
THE DELTA HABITAT CONSERVATION AND CONVEYANCE PROGRAM IN
CONNECTION WITH THE DEVELOPMENT OF THE BAY DELTA CONSERVATION
PLAN**

This First Amendment to the Memorandum of Agreement (“MOA”) Regarding Collaboration On the Planning, Preliminary Design And Environmental Compliance For The Delta Habitat Conservation And Conveyance Program In Connection with the Development of the Bay Delta Conservation Plan (“First Amended MOA”) is entered into as of the last date of execution of the signatories hereto. This First Amended MOA replaces in its entirety the MOA executed by the Parties in March 2009.

The MOA, as amended, establishes a joint process among the California Department of Water Resources (“DWR”), the U.S. Department of the Interior’s Bureau of Reclamation (“Reclamation”), the State and Federal Contractors Water Agency (“SFCWA”), Metropolitan Water District of Southern California, Kern County Water Agency, State Water Project Contractors Authority, San Luis & Delta-Mendota Water Authority, Westlands Water District, and Santa Clara Valley Water District.

The purpose of this First Amended MOA is to enable timely analysis of conservation measures and water supply measures, including Delta conveyance options that are developed in the Bay Delta Conservation Planning (“BDCP”) process. This MOA also addresses certain financial matters related to budgeting, cost sharing, funding sources, and the use of these funds to accomplish the purposes of this MOA.

RECITALS

- A. The Parties initiated the Bay Delta Conservation Plan ("BDCP") process in 2005-2006 and the Delta Habitat Conservation and Conveyance Program ("DHCCP") in 2008.
- B. The BDCP is a voluntary effort to obtain long-term, incidental take permits for the operations of the State Water Project ("SWP") and the Central Valley Project ("CVP") through development of a comprehensive Habitat Conservation Plan ("HCP") under the federal Endangered Species Act, and a Natural Community Conservation Plan ("NCCP") under the California Natural Community Conservation Planning Act. The BDCP is being developed in an open and inclusive process.
- C. The DHCCP is the program that is preparing the environmental document analyzing the BDCP pursuant to the federal National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA"), including preliminary engineering necessary to develop alternatives.
- D. The Parties have executed several agreements memorializing their ongoing commitment to the BDCP and DHCCP including: Memorandum of Agreement for Supplemental Funding for Certain Ecosystem Actions and Support for Implementation of Near-Term Water Supply, Water Quality, Ecosystem, and Levee Actions; the Bay Delta Conservation Plan Statement of Principles; Planning Agreement Regarding the Bay Delta Conservation Plan; Cooperation Agreement Among Potentially Regulated Entities for Preparation of the Bay Delta Conservation Plan; Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the Bay Delta Conservation Plan; the Agreement for Funding Between the Department of Water Resources and the San Luis & Delta-Mendota Water Authority for the Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options (as amended); and the Agreement for Funding Between the Department of Water Resources and [member of the State Water Project Contractors Authority] for Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures Including Delta Conveyance Options.
- E. The Memorandum of Agreement for Supplemental Funding for Certain Ecosystem Actions and Support for Implementation of Near-Term Water Supply, Water Quality, Ecosystem and Levee Actions expired in 2007, and the Cooperation Agreement Among Potentially Regulated Entities for Preparation of the Bay Delta Conservation Plan expired in or about January 2011.
- F. In November 2007, the BDCP Steering Committee described in a memorandum entitled "Points of Agreement for Continuing into the Planning Process," that "...the most promising approach for achieving the BDCP conservation and water supply goals involves a conveyance system with new points of diversion," and therefore the BDCP Steering Committee agreed that the DHCCP will evaluate a full range of potential facility

design and operational parameters for Delta water conveyance options to achieve the BDCP conservation and planning objectives over the near and long term.

- G. In a February 28, 2008, letter to State Senators Perata, Machado, and Steinberg, Governor Schwarzenegger stated his intention to direct DWR to proceed under CEQA to evaluate at least four alternative Delta conveyance strategies in coordination with the BDCP.
- H. The Sacramento-San Joaquin Delta Reform Act was passed by the California Legislature in 2009.
- I. In November 2010, the Natural Resources Agency released a draft BDCP HCP/NCCP to the public.
- J. The Natural Resources Agency released its “Highlights of the BDCP” in December 2010.
- K. In December 2010, the federal government released its Interim Federal Action Plan Status Update for the California Bay-Delta: 2011 and Beyond (“Interim Federal Action Plan Update”), thereby reaffirming its commitment to the BDCP.
- L. DWR issued a Notice of Preparation on February 13, 2009, under the CEQA, and the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Reclamation issued a Notice of Intent on February 13, 2009, under NEPA to commence an environmental review process for the BDCP, which will include measures that incorporate options for improving the Delta water conveyance system.
- M. The BDCP and DHCCP planning processes have progressed to a point where the most efficient use of resources can be achieved by combining the BDCP and DHCCP into a single process under a uniform set of agreements, which will facilitate a more efficient and cost effective process that:
 - (a) analyzes potential responses to multiple threats to the State’s economic well being posed by the current conveyance system’s vulnerability to seismic risk, climate change, and regulation;
 - (b) facilitates the assessment, planning and environmental analysis of likely conservation measures or elements of the BDCP, particularly the Delta water conveyance options;
 - (c) allows for equal partnership and exchange of information among the Parties as preparation of the BDCP and DHCCP continue;
 - (d) supports a plan that can adapt to the evolving Delta environmental conditions;
 - (e) considers prudent funding of species conservation and improved Delta water

conveyance facilities in order to achieve improvements to water supply, water supply reliability, and ecosystem health and resiliency.

- N. The Parties will refer to this effort as the “BDCP-DHCCP Planning Phase” or “Program”. DWR, Reclamation, and one or more of the Public Water Agencies intend to enter into separate agreements related to funding the work and/or providing mechanisms to transfer funds needed for the BDCP-DHCCP Planning Phase.
- O. To date, the Public Water Agencies have dedicated significant funding, equaling more than 150 million dollars, toward the BDCP-DHCCP Planning Phase. The Public Water Agencies anticipate dedicating significant additional funds to support its completion.
- P. The Public Water Agencies will implement portions of the BDCP, requiring the Public Water Agencies to make decisions regarding funding and plan implementation.

AGREEMENT

NOW THEREFORE, it is mutually agreed by the Parties as follows:

I. Definitions

- A. **“BDCP-DHCCP Planning Phase” or “Program”** means the set of actions described in Exhibit ____.
- B. **“BDCP-DHCCP Planning Phase funding agreements”** means each Agreement for Funding Between the Department of Water Resources and a member of the State Water Project Contractors Authority for Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options; the Agreement for Funding Between the Department of Water Resources and the San Luis & Delta-Mendota Water Authority for the Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options, as amended; and future agreements between DWR and/or Reclamation and some or all of the Public Water Agencies that will allow for funding needed to complete the BDCP-DHCCP Planning Phase.
- C. **“Public Water Agency” or “Public Water Agencies”** means SFCWA, Metropolitan Water District of Southern California, Kern County Water Agency, State Water Project Contractors Authority, San Luis & Delta-Mendota Water Authority, Westlands Water District, and Santa Clara Valley Water District.
- D. **“Party” or “Parties”** means DWR, Reclamation and the Public Water Agencies.

II. Roles and Responsibilities of the Parties

- A. The Parties will work jointly to meet the objectives of this MOA and the planning goals of the BDCP, as presented in the Planning Agreement Regarding the Bay Delta Conservation Plan.
- B. DWR, in collaboration with the other Parties, has retained environmental consultants to complete the BDCP-DHCCP Planning Phase, which includes environmental documents required under CEQA and NEPA (joint EIR/EIS). DWR will act as lead agency under the CEQA, and Reclamation, the United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) will act as co-lead agencies under NEPA. The Parties will

coordinate during the preparation of the joint EIR/EIS. This provision shall not limit DWR's, Reclamation's, FWS' or NMFS' final decision-making authority at the time of project approval or issuance of a Record of Decision ("ROD") or Notice of Determination ("NOD").

- C. Exhibit __ to this First Amended MOA is a schedule, incorporated herein by this reference, which describes the tasks to be performed and a schedule for performance of the identified tasks to complete the BDCP-DHCCP Planning Phase. The Parties recognize refinement of Exhibit __ may be necessary to conform to developing information, permitting and other requirements. Therefore, Exhibit __ may be revised from time to time upon written agreement of the Parties without constituting an amendment to this First Amended MOA.
- D. The Parties are committed to completing tasks pursuant to the schedule described in Exhibit __, as may be revised.
- E. DWR is primarily responsible for preparing the BDCP and joint EIR/EIS, in consultation with the Parties. DWR will solicit from Reclamation, FWS, and NMFS, comments on draft work products in a timely manner in support of the completion of tasks, as required by the schedule (as presented in Exhibit __ or as previously modified pursuant to this First Amended MOA). In the event Reclamation, FWS, or NMFS, does not provide comments on draft work products in a timely manner, DWR will proceed with preparation of the BDCP and joint EIR/EIS, directing the Program Manager as necessary to maintain the schedule. This provision shall not limit Reclamation's, FWS' and/or NMFS' final decision-making authority at the time of project approval or issuance of a ROD.
- F. DWR has retained a consultant with extensive project management experience to be the BDCP-DHCCP Program Manager. The Program Manager shall report directly to the Director of DWR, who is solely responsible for managing the BDCP-DHCCP Planning Phase, including directing consultants and any staff from the Parties that are assigned to assist with the BDCP and/or DHCCP. The Director of DWR will fulfill this responsibility through the Program Manager, who will carry out the day-to-day management activities of the BDCP-DHCCP Planning Phase, including staffing. Work performed by any consultant or staff from a Party outside of the direction of the Program Manager will not be charged to the BDCP-DHCCP Planning Phase.
- G. At its discretion, DWR may designate SFCWA as a consultant contract administrator, with all or some of the consultants contracting directly with SFCWA to complete all or part of the BDCP-DHCCP Planning Phase. In the event DWR designates SFCWA as a consultant contract administrator, the Program Manager will continue to report to the Director of DWR and to manage the BDCP-DHCCP Planning Phase, including the consultants under

contract with SFCWA, as described in Subsection I(F). This provision does not limit DWR's, Reclamation's, FWS' or NMFS' final decision-making authority at the time of project approval or issuance of a ROD or NOD.

- H. The Parties will support listing the Public Water Agencies as “applicants” and “permittees” along with DWR pursuant to section 10 of the federal ESA, and “plan participants” and “permittees” under the NCCPA, California Fish and Game Code, section 2800 *et. seq.*
- I. The Parties acknowledge that the Public Water Agencies are responsible agencies pursuant to CEQA.
- J. The Public Water Agencies shall be provided all draft consultant work product for review and comment on the same schedule as DWR. See Exhibit _____. DWR and the Public Water Agencies will work cooperatively to address all comments received during the BDCP-DHCCP Planning Phase, including comments received during development of the BDCP and joint EIR/EIS.
- K. The Parties shall meet at least once monthly to discuss BDCP-DHCCP Planning Phase management, including the status of the BDCP and joint EIR/EIS, consultant scope, direction and work product; sources of funds; commitments; obligations; encumbrances; expenditures; projected expenditures to completion; and a comparison of actual budgeted expenditures. If it appears to the Program Manager that a task included in the schedule (as presented in Exhibit ____ or as previously modified pursuant to this First Amended MOA) will not be completed in a timely manner, the Director of DWR will consult with the Public Water Agencies on actions necessary to maintain the schedule or potential revisions to the schedule. If an agreement cannot be reached, any Party may invoke the provisions of this First Amended MOA for withdrawal, substitution, or termination.
- L. In the event that DWR has not provided direction to the Program Manager and/or consultant when required to maintain the schedule presented in Exhibit _____, the Director of DWR shall consult with the Public Water Agencies, which shall recommend to the Director the decision and direction to the Program Manager to maintain the schedule. This does not limit DWR's, Reclamation's, FWS' or NMFS' final decision-making authority at the time of project approval or issuance of a ROD or NOD.
- M. The Parties will coordinate all activities related to fulfillment of the purpose of this First Amended MOA. The Parties shall cooperate with one another and work as efficiently, expeditiously, and effectively as possible in the pursuit of all activities and decisions described in this First Amended MOA and those that are not particularly described but which are related to or arise out of the activities that are described.

- N. As requested by the Program Manager, each of the Parties will provide expertise, guidance, and data on those matters for which it has specific expertise or authority, as needed to carry out the work and meet the purpose of this First Amended MOA.
- O. The Program Manager will ensure that staffing is available to complete the BDCP-DHCCP Planning Phase, including the BDCP and joint EIR/EIS and to assist the Program Manager, consistent with Exhibit ____.
- P. The Parties may retain consulting services as necessary to complete the BDCP-DHCCP Planning Phase, including the BDCP and joint EIR/EIS and to assist the Program Manager, and work under his direction, consistent with Exhibit ____.
- Q. Concurrent with the release of the public draft of the BDCP, the Public Water Agencies shall release a complete financing plan for the design, construction, operation, and maintenance of any conveyance facilities that will be constructed as part of the BDCP.

III. Program Funding

- A. Funding pursuant to this First Amended MOA addresses only the BDCP-DHCCP Planning Phase. If the Parties determine to proceed with actions beyond the BDCP-DHCCP Planning Phase, the Parties may enter into amended or supplemental agreements.
- B. The Program Manager has developed a budget for the remainder of the BDCP-DHCCP Planning Phase, and will work cooperatively with the Parties to develop revisions to the budget, if necessary. Supplemental or amended funding agreements are contemplated by one or more of the Public Water Agencies that will commit additional funds to complete the BDCP-DHCCP Planning Phase.
- C. DWR shall provide the Public Water Agencies with copies of all draft task work orders for any work performed during the BDCP-DHCCP Planning Phase, including on the BDCP and joint EIR/EIS for review by the Public Water Agencies prior to approval by DWR.
- D. Participating Public Water Agencies have agreed among themselves that the costs of the BDCP-DHCCP Planning Phase should be shared equally: 50% by Public Water Agencies that receive water from the SWP and 50% by Public

Water Agencies that receive water from the CVP. Additionally the Public Water Agencies have agreed that in-kind services or funding provided by Reclamation will be credited towards the portion of the BDCP-DHCCP Planning Phase costs for which Public Water Agencies that receive water from the CVP are responsible.

- E. DWR will sign separate funding agreements with participating Public Water Agencies that receive water from the CVP and a financial assistance agreement with Reclamation. DWR will also sign separate funding agreements with participating Public Water Agencies that receive water from the SWP and willing to advance funds for BDCP-DHCCP Planning Phase costs through billing procedures based upon the Water Supply contracts. The separate funding agreements for both the Public Water Agencies that receive water from the SWP and the Public Water Agencies that receive water from the CVP will allow a Public Water Agency to withdraw from this First Amended MOA and the separate funding agreement under specified conditions, without impeding continuing participation of the remaining Public Water Agencies.
- F. Reclamation may sign a separate agreement(s) with certain Public Water Agencies that receive water from the CVP to facilitate Reclamation's funding of the BDCP-DHCCP Planning Phase.
- G. The BDCP-DHCCP Planning Phase will be completed in three parts referred to as milestones. The planning milestones are the following: 1.) Administrative review draft of the BDCP and joint EIR/EIS; 2.) Public review draft of the BDCP and joint EIR/EIS; and 3.) Final BDCP and joint EIR/EIS. In addition, preliminary engineering may proceed as a concurrent activity during or subsequent activity to any part of the Planning Phase. See Exhibit ____.
 - a. The Public Water Agencies agree to fund the first milestone identified above.
 - b. The Public Water Agencies will consider funding the additional milestones, identified above as milestones 2 and 3, and preliminary engineering. DWR may not commence work on milestones identified above as 2 and 3 or on preliminary engineering using funds provided by the Public Water Agencies until the Public Water Agencies provide the Director of DWR with written authorization to proceed. In

determining whether to proceed, the Public Water Agencies shall consider, but are not limited to, the following 1) adherence to the schedule in Exhibit __, 2) adherence to the Project Manager's budget, and 3) adherence to the project management and planning principles set forth this First Amended MOA and BDCP-DHCCP Planning Phase funding agreements with the Public Water Agencies.

- H. Upon completion of the Planning Phase, and if the BDCP proceeds to implementation, a mechanism shall be established between the Public Water Agencies and DWR for reapportionment of BDCP-DHCCP Planning Phase costs based on calculated benefits conferred from the implementation of the BDCP. Any funds or in-kind services provided by Reclamation during the BDCP-DHCCP Planning Phase are considered sunk costs and are not available for reapportionment as described above, but shall continue to be credited toward the obligation of the Public Water Agencies that receive water from the CVP as described in Subsection III(D).
- I. In the event DWR designates SFCWA as a consultant contract administrator, DWR shall continue collecting funds from the Public Water Agencies pursuant to the BDCP-DHCCP Planning Phase funding agreements, and DWR shall distribute those funds to SFCWA to fund the consultants that are contracting directly with SFCWA for the completion of the BDCP-DHCCP Planning Phase.
- J. In the event an individual Public Water Agency withdraws from this First Amended MOA pursuant to Section __, that Public Water Agency shall not be responsible for the cost of any BDCP-DHCCP Planning Phase task orders that are subsequently approved pursuant to terms of this First Amended MOA or that were approved less than 60 days prior to the date the notice of withdrawal was transmitted to DWR pursuant to Section __. The withdrawal of one or more Public Water Agencies shall not impair the authority of the remaining Public Water Agencies to continue with the implementation of this MOA. However, the withdrawn Public Water Agency shall remain responsible for the costs of completing any BDCP-DHCCP Planning Phase task order approved prior to the dates set forth above. Any funding agreement entered into in conjunction with this MOA will include such terms and conditions necessary to effectuate the intent of this provision.
- K. If additional funds from non-Parties become available and are appropriated for any action in furtherance of the BDCP-DHCCP Planning Phase, the

Parties will determine how the additional money will affect the shared cost allocations and/or contributions by the Parties in the separate funding agreements.

IV. Withdrawal, Substitution and Termination.

- A. Subject to any restrictions established by any BDCP-DHCCP Planning Phase funding agreements, any Party may withdraw from this MOA upon 30 days written notice to the other Parties. If a Party intends to withdraw it shall, coincident with providing notice to the other Parties, provide a detailed written explanation to the other Parties explaining why the Party intends to withdraw. A party providing notice may rescind that notice or extend the date on which withdrawal is effective.
- B. If DWR and/or all of the Public Water Agencies withdraw from this First Amended MOA, it shall terminate. If Reclamation or any individual Public Water Agency withdraws from this First Amended MOA, the remaining Parties shall notify DWR within seven days of the effective date of the withdrawal as to whether they intend to continue operating under this First Amended MOA. Failure to provide such notice shall be deemed an agreement to continue as a Party to this First Amended MOA. In the event of termination, the Parties' liability for reasonable termination costs shall be set forth in the separate funding agreements. In the event of withdrawal by one or more of the Public Water Agencies, liability for costs incurred in fulfillment of the BDCP-DHCCP Planning Phase or the purpose of this First Amended MOA shall be set forth in the separate funding agreements, in accordance with Section __ of this MOA. In the event of withdrawal by Reclamation, liability for costs incurred in fulfillment of the BDCP-DHCCP Planning Phase or the purpose of this First Amended MOA shall be set forth in the financial assistance agreement.
- C. In the event of termination of this First Amended MOA prior to any of the following, certification of the joint EIR/EIS, issuance of a ROD for the BDCP, or issuance of a NOD for the BDCP, (1) unless prohibited by law, DWR shall provide to the Public Water Agencies the draft BDCP, draft joint EIR/EIS and all documents that comprise the work product for draft BDCP and for the draft joint EIR/EIS, and (2) the Parties agree that the Public Water Agencies will own all of said documents and have the right to use the documents, in whole or in part, for any purpose the Public Water Agencies deem appropriate. For purposes of this section, "draft BDCP, draft joint EIR/EIS and all documents that comprise the work product" includes, but is

not limited to, technical tools, work products and data such as computer models and results of modeling, geotechnical and other survey data, and preliminary engineering plans.

- D. If the First Amended MOA terminates prior to completion of the BDCP-DHCCP Planning Phase, and there are unspent funds that have been previously collected from the Public Water Agencies by DWR to fund the BDCP-DHCCP Planning Phase, DWR shall return the unspent funds to the appropriate Public Water Agencies. If DWR is precluded by law from returning the unspent funds, DWR will provide each appropriate Public Water Agency a credit that can be applied to any charges levied by DWR against the Public Water Agency.

V. Miscellaneous Provisions

- A. Within __ days of this First Amended MOA becoming effective, DWR will seek to negotiate with the environmental consultant(s) retained to complete the BDCP-DHCCP Planning Phase to amend their existing contracts or to enter into new contracts to allow DWR to meet its obligations assumed in this First Amended MOA or otherwise effectuate the purpose of this First Amended MOA. If DWR is not able to negotiate such changes, the Parties will meet to discuss how best to proceed.
- B. Unless otherwise stated specifically, this First Amended MOA may only be modified by written agreement of all of the Parties.
- C. No Delegation of Authorities.
1. Nothing in this First Amended MOA constitutes a delegation by any Party of its existing authority to make any decision it is mandated by law to make.
 2. Nothing in the First Amended MOA shall amend, abridge, or modify any provisions of the Water Supply Contracts between DWR and any SWP contractor or the water supply or water service contracts between Reclamation and any CVP contractor.

3. All provisions of this First Amended MOA are intended and will be interpreted to be consistent with all applicable provisions of State and Federal law. The undersigned recognize that public agencies signatories to this First Amended MOA have specific statutory responsibilities, and that actions of these public agencies must be consistent with applicable procedural and substantive requirements of State and Federal law. Nothing in this First Amended MOA is intended to, nor will have the effect of, constraining or limiting any public entity in carrying out its statutory responsibilities. Nothing in this First Amended MOA constitutes an admission by any party as to the proper interpretation of any provision of law, nor will it have the effect of, waiving or limiting any public entity's rights and remedies under any applicable law.
 4. Execution of this First Amended MOA does not constitute a waiver by any signatory of any right or remedy it may have, nor does execution constitute pre-approval or any project or preferred project alternative, or waive or otherwise abridge responsible trustee duties required, or discretion authorized, under State and Federal law.
- D. The expenditure of any money or the performance of any obligation of the United States under this First Amended MOA shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States for failure to perform any obligation under this First Amended MOA in the event that funds are not appropriated or allotted.
- E. This First Amended MOA shall become effective upon the last date of signature of the Parties listed below and upon the execution of the funding agreements referenced in Section III above.
- F. The Parties may execute this First Amended MOA in multiple originals each of which will be deemed to be an original office copy, or counterpart.